82-1287

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RANDOLPH ASSOCIATES, a partnership composed of Howard Bass, Lawrence Berger, Clayton Holding Co., a New Jersey corporation, Steven Rachlin, SBS Associates, Ltd., a partnership, and Howard Wachtel,

Petitioner,

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, and RONETCO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err in denying antitrust standing to plaintiff-real estate developer where defendants' aborting plaintiff's real estate development contract with one of the defendants was the means defendants used to further and to effectuate their *per se* illegal horizontal territorial allocation of retail supermarkets whose ultimate effect was directed at defendants' retail consumers?

2. Did the courts below err in effectively ruling that a victim of a *per se* illegal antitrust violation shall go uncompensated and that the perpetrators of the violation can continue under their unlawful agreement unpunished and undeterred?

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Randolph Associates petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this case on October 26, 1982.

OPINIONS BELOW

The Judgment Order of the Court of Appeals is printed *infra* in App. A at 1a. The opinion of the United States District Court for the District of New Jersey dismissing the complaint following a "hearing" initiated by the District Court appears at 1982-1 Trade Cas. (CCH) ¶ 64,619 (D.N.J. 1982) and is printed *infra* in App. B at 4a with the order printed *infra* in App. C at 11a. The earlier opinion of the District Court denying defendants' motion to dismiss appears at 1982-1 Trade Cas. (CCH) ¶ 64,618 (D.N.J. 1981) and is printed *infra* in App. D at 12a, with the earlier order and amended order printed in App. E at 18a.

JURISDICTION

The decision of the Court of Appeals was filed on October 26, 1982. Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Petitioner alleges a violation by respondents of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, which are printed in full *infra* in App. F at 22a. Petitioner instituted this action pursuant to §§4 and 16 of the Clayton Act, 15 U.S.C. §15 and 26, which are printed in full *infra* in App. G at 23a.

STATEMENT OF THE CASE

A. *Background Facts*

Petitioner-plaintiff Randolph Associates is in the business of commercial real estate development in New Jersey. Its predecessor had contracted with respondent-defendant Village Supermarket, Inc., to construct and lease to the latter for 20 years a building as part of a "shopping center and professional office complex" on a 17-acre site in Randolph Township in northern New Jersey. Village was to operate the building as a Shop-Rite retail supermarket, a use which was "critical to the success of the proposed project."

The lease language which was deemed dispositive by the trial court did not on its face "require" such a use:

> 4. *Use of Leased Premises:* The leased premises shall be used for all lawful purposes including the conduct of a supermarket for the retail sale of food, drugs, and such non-food items as are sold in supermarkets in the Metropolitan New York area, however, Tenant shall not have a registered pharmacy nor sell alcoholic beverages. . .

Respondents-defendants RoNetco, Inc., and Dominick Romano operate a Shop-Rite retail supermarket in Succasunna, New Jersey within 5 miles of the proposed Shop-Rite site in Randolph Township. Both Village and Romano/RoNetco are members of respondent-defendant Wakefern Food Corp., a cooperative association owned by members who operate Shop-Rite retail supermarkets, for whom Wakefern provides warehousing, purchasing, distribution, and advertising services.

Unbeknownst to plaintiff, these defendants had conspired to restrain interstate commerce by agreeing

that no Wakefern member could use the name "Shop-Rite" or operate a Shop-Rite retail supermarket within a five-mile radius of a pre-existing Shop-Rite supermarket without the express consent of the owner of such pre-existing Shop-Rite; discovery, so far precluded as discussed below, may well indicate the conspiracy has additional dimensions to it. In furtherance of and in actual effectuation of this *per se* illegal horizontal territorial allocation of markets, defendants Romano/RoNetco refused to consent to the proposed Shop-Rite operation on Randolph's premises, Wakefern failed and refused to permit the operation, and Village breached its contract with Randolph.

The limited and uncontroverted evidence presented by petitioner at the Fed. R. Civ. P 42(b) hearing elaborated on these admitted allegations. Village and Randolph initially commenced to implement their contract by working jointly in developing plans and specifications for the proposed Shop-Rite supermarket. All necessary governmental site-plan and environmental agency approvals and Economic Development Authority financing were obtained. In mid-stream, however, the project was aborted because Romano/RoNetco objected, and Village then breached its contract with Randolph.

The consequences for plaintiff and its anticipated development of a commercial shopping center are obvious. Plaintiff's damages include tangible and easily calculated out-of-pocket disbursements for architects, surveyors, and the like; compensation for its useless efforts expended to obtain financing, zoning approval, and the like for the project; the loss of Village's contribution towards construction costs; and finally the promised fixed rental over the 20 year period of the lease as well as anticipated overage rent.

B. *Procedural History*

Plaintiff filed its complaint and demand for jury trial against all defendants on April 9, 1981. Jurisdiction of the District Court was based upon §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26.

On June 29, 1981, defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for lack of standing and conceded for the purposes of their motion that (1) they invoked the horizontal territorial allocation of markets, and (2) Village's breach resulted from that invocation. Because defendants submitted a copy of the lease in support of their motion, the District Court resolved the motion under Fed. R. Civ. P. 56. In an opinion dated October 30, 1981, the District Court denied the motion.

On May 12, 1981, plaintiff served on each defendant Plaintiff's First Request for the Production of Documents. Discovery was stayed by agreement of the parties during the pendency of defendants' motion. Thereafter, defendants managed to thwart completely any discovery under the guise of negotiating a protective order, and on January 4, 1982, plaintiff filed a motion to compel each defendant to produce the requested documents.

On January 18, 1982, defendants filed a motion to re-argue their motion to dismiss. On January 28, 1982, plaintiff's counsel was notified by telephone that the District Court, on its own initiative, would hold a hearing on February 3, 1982. The Court's law clerk advised the parties to bring such documents as would shed light on whether plaintiff and defendant Village had contracted for the construction and operation of a Shop-Rite supermarket. Apparently, the Court called this "evidentiary" hearing on the authority of *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598 (5th Cir. 1982). The

Court gave no notice before the proceeding, and offered little guidance at it, as to the precise issues to be addressed.

Plaintiff attempted by both subpoena and oral request to compel defendants to produce relevant individuals and documents. These efforts were rebuffed with the approval of the Court which rejected plaintiff's protestations and applications for a continuance of the hearing to permit proper preparation and complete evidence on the standing issue. Defendants presented no evidence. In sum, plaintiff was compelled on three days' notice to participate in a conclusive standing hearing for which it was denied not only any discovery, but the right to subpoena witnesses and evidence on its behalf. Following the hearing, the District Court in an opinion dated March 2, 1982, reversed its earlier ruling, dismissed the antitrust claims, and dismissed the pendent state claims.

On October 26, 1982, the Court of Appeals for the Third Circuit affirmed the District Court's dismissal. In its very brief judgment order entered just four months after this Court announced its antitrust standing decision in *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540 (1982), the Court of Appeals affirmed that dismissal, citing only Third Circuit antitrust standing cases and literally ignoring both *Blue Shield* and this Court's other crucial antitrust standing case, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

This case, therefore, is before this Court upon a summary dismissal of the complaint without plaintiff's having had the benefit of either pretrial discovery or a trial. Although the Court of Appeals affirmed the dismissal based on plaintiff's alleged lack of standing, nowhere did it address either of this Court's seminal cases which set forth the current standards for determining antitrust standing.

REASONS FOR GRANTING THE WRIT

Point I

The courts below erred in denying antitrust standing to plaintiff-real estate developer where defendants' aborting plaintiff's real estate development contract with one of the defendants was the means defendants used to further and to effectuate their *per se* illegal horizontal territorial allocation of retail supermarkets whose ultimate effect was directed at defendants' retail consumers.

A. *Introduction.*

In *Brunswick*, this Court said that to have antitrust standing a plaintiff must prove "antitrust injury," *i.e.*, a plaintiff must prove he has been injured "by reason of" that which makes defendants' acts unlawful under the antitrust laws; a plaintiff's being injured "by reason of" defendants' acts alone does not suffice. The Court in *Brunswick* phrased it as follows:

> And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful. . .
>
> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.
>
> *Brunswick*, 429 U.S. at 488-489 (emphasis in original).

Last term in *Blue Shield*, this Court reaffirmed the currency and accuracy of its 1977 *Brunswick* definition of "antitrust injury," *Blue Shield*, 102 S. Ct. at 2550, and also articulated a two-part test for standing that it likened to the quest for determining proximate cause.

In the instant case, all defendants entered into a conspiracy which included a *per se* illegal horizontal territorial allocation of markets of the type specifically proscribed by this Court in *United States v. Topco Associates*, 405 U.S. 596 (1972), a case involving a supermarket territorial allocation scheme strikingly similar to Shop-Rite's. Although one of the ultimate effects of Shop-Rite's *Topco*-type conspiracy was and still is to limit intra-brand competition at the expense of the consumer, defendants—either through Village's unilateral conduct induced partially or wholly by the other defendants or through all defendants' group boycott of Randolph—in furtherance of and in actual effectuation of their overall *Topco*-type scheme, aborted the development of the Shop-Rite supermarket in issue and thereby injured Randolph. Randolph, a supplier or seller to purchasers who are in a market being restrained by those purchasers, thereby was injured "by reason of" that which made defendants' agreement unlawful under the antitrust laws.

In affirming the District Court's denial of antitrust standing to Randolph, however, the Third Circuit acknowledged it was relying on its own antitrust standing cases and literally ignored this Court's decisions in *Brunswick* and *Blue Shield*. This action by the Court of Appeals was manifestly improper, inasmuch as analysis of these cases clearly demonstrates that Randolph has antitrust standing.

B. ***In furtherance of and in actual effectuation of their overall* Topco*-type conspiracy, defendants caused "antitrust injury" to plaintiff.***

In *Topco*, the United States sought injunctive relief against Topco Associates, a cooperative association consisting of and completely controlled by the member—

supermarket chains, because Topco's members agreed to sell Topco-branded products only within the marketing territory allocated to each of them and further agreed to refrain from selling Topco-branded products outside of that allocated marketing territory. Through the Topco by-laws, members could veto actual or potential competition from a Topco retail operation in the territories of concern to them. The Court observed that certain acts are *per se* violations of the Sherman Act because "of their pernicious effect on competition and lack of any redeeming virtues," *Topco*, 405 U.S. at 607, "[o]ne of the classic examples of a *per se* violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition," *Topco*, 405 U.S. at 608, and "[t]his court has reiterated time and time again that [h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." *Topco*, 405 U.S. at 608, citing *White Motor Co. v. United States*, 372 U.S. 253 (1963). The Court held the Topco restraint was a horizontal one and therefore a *per se* violation of §1. This Court has never waivered in its view that horizontal restraints are illegal *per se*. See, *e.g.*, *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982), announced by this Court on June 18, 1982, three days before it announced *Blue Shield*.

In furtherance of and in actual effectuation of their *Topco*-type agreement, defendants here caused the aborting of the Village-Randolph contract either through Village's unilateral conduct induced partially or wholly by the other defendants or through all defendants' group boycott of Randolph. Although one of the ultimate effects of Shop-Rite's *Topco*-type agreement was and still is to limit intra-brand competition at the expense of the consumer, a plaintiff such as Randolph injured by conduct in furtherance of the unlawful restraint and not by its ultimate effect has standing to sue

under §4. See *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1378, 1382, 1387 n.25 (9th Cir. 1982); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Hoopes v. Union Oil Company of California*, 374 F.2d 480 (9th Cir. 1967). Phrased differently, Randolph's injuries resulted not from the Sherman Act—proscribed restraint upon the market in which defendants were engaged, but rather from the *means* used to accomplish that restraint.

In *Ostrofe*, a sales manager was forced to resign because he refused to participate in a scheme by which his employer and other manufacturers of paper lithograph labels fixed prices, rigged bids, and allocated markets. The Ninth Circuit upheld the sales manager's right to pursue under §4 a unilateral refusal to deal claim against his former employer and a group boycott claim against other industry employers when, after the termination of his employment, he was boycotted from further employment in the labels industry.

On the group boycott claim, the Ninth Circuit, citing *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), said group boycotts "directed at a single trader, or employee are illegal *per se* regardless of the overall affect in the market." *Ostrofe*, 670 F.2d at 1381 n. 3. It held that the "boycott aimed at Ostrofe was a violation of the Sherman Act in itself," *Ostrofe*, 670 F.2d at 1381, and concluded that Ostrofe could challenge the entire conspiracy even if the injury complained of did not result from the restraint on competition:

> Persons injured by an agreed-upon refusal to deal employed as a part of a conspiracy to restrain or monopolize trade and commerce have been permitted to challenge the conspiracy as a whole even though their injuries did not result from the re-

> straint on competition that was the principal object of the conspiracy. [Extensive citation from text and accompanying footnote omitted.]
>
> *Ostrofe*, 670 F.2d at 1382.

As to the unilateral refusal to deal claim against the former employer, the court stated that "parties injured by unilateral conduct in furtherance of an unlawful restraint of trade have been permitted to challenge the overall scheme." *Ostrofe*, 670 F.2d at 1382. The court further observed that in *Mulvey*, 433 F.2d 1073, and in *Hoopes*, 374 F.2d 480, it had held that "plaintiffs injured by unilateral conduct in furtherance of an unlawful restraint not amounting to a refusal to deal had standing to sue." *Ostrofe*, 670 F.2d at 1382 n. 5.[1]

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1. In *Hoopes*, plaintiffs, owners-conditional vendors of an automobile service station, alleged that defendant oil company sought to restrain competition by restricting a substantial number of service stations, including plaintiffs', to the sale of defendant's gasoline, for the purpose and effect of preventing sales competitive to defendant at such service stations. Plaintiffs contended that the imposition and enforcement of the anti-competitive condition was "aimed" at restricting the use of their property, the damage they suffered was theirs and not that of their tenants or of others, and their injuries arose directly from their own relationship with defendant. Plaintiffs challenged defendant's "entire course of conduct" regarding exclusivity, and the Ninth Circuit concluded:

> It is no bar to recovery that appellants were not competitors of Union, or that appellants' *injuries* did not *result* from the allegedly illegal restraint upon the marketing of petroleum products but rather *from the means which Union used to accomplish that restraint.*
>
> *Hoopes*, 374 F.2d at 486 (emphasis added).

Hence, *in Hoopes*, as in *Ostrofe* and the instant case, the alleged antitrust injuries of plaintiffs resulted not from the illegal restraint upon the market in which defendants were engaged but from the "means . . . used to accomplish that restraint."

After making the *Brunswick* analysis, the Ninth Circuit found that Ostrofe's "removal [after his refusal to cooperate in the antitrust violations] was essential to the success of the scheme," *Ostrofe*, 670 F.2d at 1388, and thereby Ostrofe was injured "by reason of" that which made the agreements unlawful under the antitrust laws. In the instant case, defendants either through Village's unilateral conduct induced partially or wholly by the other defendants or through all defendants' group boycott of Randolph—in furtherance of and in actual effectuation of their overall *Topco*-type, *per se* illegal scheme—aborted the development of the Shop-Rite supermarket in issue and injured Randolph. Randolph was injured not "by reason of" the fortuitous existence of defendants' agreement, but "by reason of" that which made defendants' agreement unlawful under the antitrust laws. Randolph's injury resulted from the means used to accomplish the restraint that was unlawful under the antitrust laws, and accordingly Randolph can challenge the overall scheme, even if its injury did not result from the restraint on competition in the market that was the principal object of the conspiracy. Furthermore, discovery thus far precluded in its entirety, may well indicate that the Shop-Rite conspiracy has additional dimensions to it.

In light of the foregoing, it is manifest that defendants' arguments below to the effect that Randolph's antitrust claims against them are "secondary," "derivative," "tangential," "remote," or "indirect" are only rhetorical flourishes.[2] The simple facts are Randolph had a written

2. In *Illinois Brick*, the Court noted "the question of which persons have been injured by an illegal overcharge for purposes of Section 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under Section 4." *Illinois Brick v. Illinois*, 431 U.S. 720, 728 (1977). After referring to its *Illinois Brick* observation, the Court

contract with Village to build a Shop-Rite supermarket at a particular site and defendants aborted this contract in furtherance of and in actual effectuation of their horizontal territorial allocation of markets. Hence, Randolph is not "claiming through" anyone else: Randolph's injuries arose from its own, not someone else's, relationship with Village, and the damages it seeks to recover are its own, not someone else's.

C. *Plaintiff has antitrust standing under* Blue Shield.

In *Blue Shield*, this Court held plaintiff, who was denied group health plan reimbursement for psychotherapeutic services rendered by a psychologist, had antitrust standing to maintain an action under §4 against the group health plan and an organization of psychiatrists for conspiracy to restrain competition in the psychotherapy market by permitting reimbursement for services of psychiatrists but not those of psychologists. Besides confirming the *Brunswick* definition of "antitrust injury," the Court in *Blue Shield* outlined a two-part test for determining antitrust standing, a process it likened to the elusive search for "proximate cause":

> In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been

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in *Blue Shield* proceeded to say that the problem of remoteness, *i.e.*, those too targentially affected by the antitrust violation, would be handled by applying a two-part test discussed *infra*. *Blue Shield*, 102 S. Ct. at 2547-2549. Defendants below argued remoteness as an independent basis for denying standing, and they may attempt to do so here. The short answer, after *Blue Shield*, is that the two-part test for standing will also dispose of the issue of remoteness.

> concerned in making defendant's conduct unlawful and in providing a private remedy under §4.
>
> *Blue Shield*, 102 S. Ct. at 2548.

In application of this test to the facts in *Blue Shield*, the Court observed that the conspirators' goal "was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves," *Blue Shield*, 102 S. Ct. at 2548, and further observed that plaintiff was a "foreseeable victim" of that "concerted refusal to pay," *Blue Shield*, 102 S. Ct. at 2548-2549. The Court said the availability of the §4 remedy was not a question of the conspirators' specific intent and proceeded to find, as the Ninth Circuit did in *Ostrofe* and *Hoopes* prior to the *Blue Shield* decision, that defendants' "means" for achieving the antitrust violation, or defendants' "necessary step in effecting the ends of the illegal conspiracy," constituted in and of itself an antitrust violation:

> Denying reimbursement to subscribers for the cost of treatment *was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends.* The harm to McCready and her class was *clearly foreseeable;* indeed, it was a *necessary step in effecting the ends of the illegal conspiracy.* Where the injury alleged is so *integral* an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause." [Citations omitted.]
>
> *Blue Shield*, 102 S. Ct. at 2549 (emphasis added).

The defendants in *Blue Shield* argued that plaintiff could not maintain an action under §4 because her injury "did not reflect the anticompetitive effect" of the illegal violation, but the Court rejected the argument, quoting

from *Brunswick* that a plaintiff need not "prove an actual lessening of competition in order to recover." *Blue Shield*, 102 S. Ct. at 2550.[3] The Court agreed with the *Blue Shield* plaintiff's charging the group health plan with a "purposefully *anti-competitive scheme*," *id.* (emphasis in the original), and said that although the plaintiff in *Blue Shield* (like Randolph in this case) "was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," *Blue Shield*, 102 S. Ct. at 2551.

In *Blue Shield*, and in this case, defendants' goal was to restrict competition in their own markets. In connection with the actual effectuation of defendants' "purposefully anti-competitive scheme," McCready was a "foreseeable victim" of the "concerted refusal to pay," and here Randolph was a "foreseeable victim" of either Village's unilateral conduct induced partially or wholly by the other defendants or of all defendants' group boycott. The victimization of McCready and Randolph was the "very means" to achieving the "ends of the illegal conspiracy."

D. ***Plaintiff as a supplier or seller to purchasers who are in a market being restrained by those purchasers can pursue §§4 and 16 claims against those purchasers.***

The crux of Shop-Rite's argument below was that Randolph does not have antitrust standing because the asserted violation occurred in the retail supermarket

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3. The *Ostrofe* court correctly presaged that this Court would take a restrictive view of certain language in *Brunswick* as to the anticompetitive effect of an antitrust violation. *Ostrofe*, 670 F.2d at 1387.

market and Randolph is not a participant in that market. They argued that plaintiff in *Blue Shield* was a participant in the psychotherapy market because she was a consumer in that market; from that view of the *Blue Shield* case, the Shop-Rite defendants concluded Randolph does not have standing here because it is a supplier or seller to those in the market being restrained rather than a consumer in that market.

This Court has held, however, that sellers or suppliers can have antitrust standing. In *Blue Shield*, the Court emphasized the phrase "any person" (as well as the phrase "by reason of anything") when it quoted §4 as providing a treble damage remedy to:

> *[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws.
>
> *Blue Shield*, 102 S. Ct. at 2545 (emphasis in the original).

The phrase "any person" also appears in §16. Significantly, in *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), the Court, in holding that a foreign government was within the §4 phrase "any person," said the phrase "any person" was to be given its "naturally broad and inclusive meaning." Moreover, the Court has repeatedly stated that §4 specifically includes sellers:[4]

> [t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . The Act is *comprehensive* in its terms and

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4. In *Blue Shield*, the Court also reaffirmed that §4 "contains little in the way of restrictive language," *Blue Shield*, 102 S. Ct. at 2545, and said it has "refused to engraft artificial limitations" on the §4 remedy, *Blue Shield*, 102 S. Ct. at 2545.

> coverage, protecting all who are made *victims of the forbidden practices* by whomever they may be perpetrated.
>
> *Blue Shield*, 102 S. Ct. at 2545 (emphasis added), quoting from *Mandeville Farms v. Sugar Co.*, 334 U.S. 219 (1948).

Besides making clear that the Clayton Act provides sellers or suppliers generally with antitrust standing, courts have specifically held that sellers or suppliers (1) to purchasers who are in a market being unlawfully restrained by those purchasers, and (2) who have been injured in the furtherance of and in the actual effectuation of the unlawful restraint, the ultimate effect of which is directed at the purchasers' customers, have antitrust standing to challenge the purchasers' overall restraint. In *Ostrofe*, plaintiff-employee, as a seller or supplier of human services to those in the business of making and selling certain products, had antitrust standing to challenge a conspiracy whose ultimate effect was directed at consumers of those products. In accord, *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1114 (E.D. Pa. 1979). In *Hoopes*, real estate owners, as sellers or suppliers of real estate to one in the business of refining and selling gasoline, had antitrust standing to challenge a conspiracy the ultimate effect of which was directed at consumers of the gasoline. Other cases illustrate this point, including a strikingly pertinent case, *Los Angeles Memorial Coliseum Commission v. National Football League*, 468 F. Supp. 154 (C.D. Cal. 1979), where the district court, without the benefit of this Court's decision in *Blue Shield*, held that plaintiff, an owner of real estate, had antitrust standing to seek relief from an association's location veto clause which was less stringent than the Shop-Rite clause involved here.

In that case, the Los Angeles Memorial Coliseum Commission (the "Coliseum") sued the National Football League ("NFL"), an association consisting of twenty-eight member teams, and the Los Angeles Rams, an NFL team playing at the Coliseum since 1946, after the Rams decided to move its home game site from the Coliseum to a location forty miles south. The Coliseum became convinced that its desire to replace the Rams with another NFL team would be frustrated by §§3.1 and 4.3 of the NFL's constitution and by-laws. The Coliseum claimed these sections, which required an "affirmative vote of three-fourths of the team owners before a member club may transfer its franchise from one city to another or before a new member may be admitted into the NFL," *see id.* at 156, violated §§1 and 2 of the Sherman Act.

The district court held (based upon the court's presumption that a defect it noted in plaintiff's pleadings would be cured in conformity with the court's suggestions) the Coliseum had standing under §16 of the Clayton Act to seek injunctive relief. The district court based its ruling upon the Coliseum's projected loss of revenue resulting from the Rams' leaving and the Coliseum's inability to obtain a transfer or expansion team by dent of the NFL constitution and by-laws. *Los Angeles Memorial Coliseum Commission*, 468 F. Supp. at 158.

Standing under §16 existed, the district court said, because the Coliseum adequately pleaded that its injuries would be "proximately caused" by the NFL's rules. *Los Angeles Memorial Coliseum Commission*, 468 F. Supp. at 160. It is noteworthy that proximate cause is the standard to which the Supreme Court three years later likened its two-part test for §4 standing in *Blue Shield*. The district court's decision was based upon the Ninth Circuit's decision *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir. 1973), *cert.*

denied, 414 U.S. 1045 (1973), to which this Court approvingly referred in *Blue Shield*, 102 S. Ct. at 2550. It is also significant that the district court in *Coliseum* observed that under *Multidistrict Vehicle Air Pollution* there is a lower threshold for §16 standing than there is for §4 standing.

In a subsequent decision, the district court granted the Coliseum's request for a preliminary injunction enjoining defendants from enforcing the three-fourths rule. *Los Angeles Memorial Coliseum Commission v. National Football League*, 484 F. Supp. 1274 (C.D. Cal. 1980); *rev'd*, 634 F.2d 1197 (9th Cir. 1980). Thereafter, the Ninth Circuit reversed the district court's preliminary injunction, finding there was no showing of irreparable harm and no indication of trial court balancing of the harms facing each side. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980). In concluding the Coliseum faced no irreparable harm, the Ninth Circuit said all of the factors listed by the Coliseum in support of its application for a preliminary injunction "are but monetary injuries which could be remedied by a damage award." *Id.* at 1202. The case was remanded to the district court, where the Coliseum prevailed before a jury on the liability phase of the monetary damage issue, see App. H *infra* at 25a; the quantum of the monetary damages, we are informed, has not been tried as yet.[5]

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5. We do not know whether, in light of the Ninth Circuit's clear view that monetary damages could be recovered, the pleadings were formally amended or supplemented to recite a §4 claim. The Ninth Circuit's statement on monetary injuries, followed by an actual jury trial on the liability phase of the monetary damage issue, makes clear, however, that the case in fact then was proceeding with a §4 claim as well as a §16 claim regardless of whether the pleadings were technically recast.

The structural elements of *Coliseum* are strikingly similar to those in the instant case. The Coliseum is in the business of supplying real estate, as is Randolph. The Coliseum is not in the football business, as Randolph is not in the supermarket business. The ultimate effect of the restraint in both cases was directed at defendants' customers. Both the Coliseum and Randolph were thwarted and injured in their business of supplying real estate "by reason of" an association's location veto clause. Both sought injunctive relief under §16.[6] In Randolph's situation, the veto clause is more dramatic because one negative vote, rather than three-fourths of twenty eight votes as in the *Coliseum* case, effectuates the veto. Based upon the allegation that the location veto rule "proximately caused" the injury to it, the Coliseum, with the Ninth Circuit's express blessing, had standing to seek injunctive relief and to present to a jury a claim of monetary injury (on which it has prevailed on liability thus far). In the Third Circuit, however, Randolph's case has been dismissed on the pleadings, without discovery or trial. There is no principled basis for permitting the Coliseum to prosecute its §§4 and 16 claims in the Ninth Circuit and forbidding Randolph from doing same in the Third Circuit.

Cases involving block booking, where a film distributor ties sale of a desirable film or program to the exhibitor's purchase of a less desirable production, also illustrate the point. Although the ultimate effect of the illegal tie-in is directed at the exhibitor bidding to purchase the

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6. Randolph demanded in its prayer for relief that "defendants . . . be permanently enjoined from conspiring to prevent plaintiff from constructing and leasing a 'Shop-Rite' supermarket on its site in Randolph Township by their refusal to permit the use of the 'Shop-Rite' name in connection with such site, and from horizontally dividing markets in restraint of trade or commerce among the several states in the retail supermarket business".

desirable production, courts have held that those who sell those productions to the distributor have antitrust standing to challenge the illegal tie-in. *Mulvey*, 433 F.2d 1073, which was cited by the Ninth Circuit in *Ostrofe; Aurora Enterprises v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982).

In *Mulvey*, plaintiff had sold several films to a distributor who thereafter engaged in block booking practices involving those films. The consideration plaintiff was to receive for the sales was based principally upon a percentage of the net receipts generated by the film's distributor. Plaintiff contended he failed to receive the contractual maximum because of the block booking. The Ninth Circuit rejected defendant distributor's argument that breach of contract was the "controlling" cause of plaintiff's injury, stating as follows:

> He distributed them, using a method that violated section 1 of the Sherman Act. It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a common-law remedy for that wrong. The antitrust laws are an expression of federal public policy to foster free competition. The treble damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct. That purpose would be frustrated by remitting to his common-law remedies one who has been injured by such conduct. [Citation omitted.]
>
> *Mulvey*, 433 F.2d at 1075.

Finding that plaintiff had standing, then-Judge Hufstedler said:

> But Mulvey was "hit" as squarely as were Karseal and Hoopes: He was neither sideswiped nor struck by a carom shot. He was within the area "which it could reasonably be foreseen would be affected" by block booking. [Citation omitted.]
>
> *Mulvey*, 433 F.2d at 1076.

In *Aurora Enterprises*, which was argued and decided after this Court's decision in *Blue Shield*, the Ninth Circuit reversed the district court's determination (at 524 F. Supp. 655 (C.D. Cal. 1981)) made prior to *Blue Shield*, that producers of television shows did not have standing to pursue a §4 claim against television networks, syndicators of television programs, and others for block booking. The Ninth Circuit observed that "[t]he narrow view that standing exists only for competitors of the product that is marketed has been rejected in *Blue Shield*," and went on to hold that plaintiffs had antitrust standing to pursue §4 claims for the *per se* illegal tying arrangement of which they complained. *Aurora Enterprises*, 688 F.2d at 692-693.

Ostrofe, *McNulty*, *Hoopes*, *Coliseum*, *Mulvey*, and *Aurora Enterprises* have a clear message: sellers or suppliers (1) to purchasers who are in a market being unlawfully restrained by those purchasers, and (2) who have been injured in the furtherance of and in the actual effectuation of the unlawful restraint, the ultimate effect of which is directed at the purchasers' customers, have antitrust standing to challenge the purchasers' overall restraint. Such sellers or suppliers are "victims" of antitrust schemes and have been injured "by reason of" that which makes the complained of acts or agreements unlawful under the antitrust laws. These cases also demonstrate that sellers or suppliers so injured, like the injured consumer in *Blue Shield*, can challenge the antitrust violators' "purposefully anti-competitive scheme," even if

(1) the plaintiff is not in the business in which defendants are engaged, and (2) plaintiff does not "prove an actual lessening of competition."

E. *Conclusion*

The matrix for all lower court decisions on antitrust standing is and must be this Court's decisions in *Brunswick* and *Blue Shield*. In expending the effort to hear and decide *Brunswick* and *Blue Shield* in the midst of its enormous workload, this Court must have intended *Brunswick* and *Blue Shield* to be both precedential and instructive to lower courts in their deliberations on antitrust standing issues. Yet, the Third Circuit ignored both *Brunswick* and *Blue Shield*, a conscious omission inasmuch as both sides discussed these cases in their Third Circuit briefs.

The Third Circuit's refusal to recognize the existence of *Blue Shield*, just four months after its birth, should be of especial concern to this Court, particularly since Randolph occupies a position analytically indistinguishable from the "victim" in *Blue Shield*. The Third Circuit's ruling, left unreviewed by this Court, is an open invitation to courts of appeals and district courts around the country to conclude *Blue Shield* is a pariah, accidentally created by this Court and blithely to be ignored in the future by all courts.

Defendants' *Topco*-type agreement here is so pernicious and so lacking in value that it is a naked restraint and is illegal *per se*. Although the ultimate effect of ShopRite's *Topco*-type agreement was and still is to limit intra-brand competition at the expense of the consumer, defendants—either through Village's unilateral conduct induced by the other defendants or through all defendants' group boycott of Randolph—in furtherance of and in actual effectuation of their overall *Topco*-type

scheme, aborted the development of the Shop-Rite supermarket in issue and injured Randolph. Randolph thereby was injured "by reason of" that which made defendants' agreement unlawful under the antitrust laws, *i.e.*, Randolph's injury resulted from the means used to accomplish the restraint that was unlawful under the antitrust laws.

Being a "foreseeable victim" whose victimization was the "very means" of "effecting" the "purposefully anti-competitive scheme," Randolph can challenge that overall scheme, even if it is not in the business in which defendants are engaged and even if its injury resulted from the "very means" to achieve the illegal ends and not from an "actual lessening of competition" in the market which was the principal object of the overall scheme. Inasmuch as §§4 and 16 clearly include suppliers or sellers within their protective scope, Randolph as a supplier or seller to purchasers who are in the market being unlawfully restrained by those purchasers can pursue its §§4 and 16 claims against such purchasers who in the actual effectuation of their illegal scheme in that restrained market injured Randolph. The Court should review this matter in order to reinstate the antitrust complaint of a plaintiff injured "by reason of" the antitrust laws and to advise lower courts that their antitrust standing decisions cannot be made in intentional and deliberate disregard of this Court's decisions in *Brunswick* and *Blue Shield*.

Point II

The Courts below erred in effectively ruling that a victim of a *per se* illegal antitrust violation shall go uncompensated and that the perpetrators of the violation can continue under their unlawful agreement unpunished and undeterred.

A *per se* violation of the antitrust laws has occurred. Left unreviewed, a victim of that *per se* violation will go uncompensated and the intentional perpetrators of that *per se* violation will go unpunished and undeterred under the antitrust laws. Left unreviewed, the Third Circuit's ruling remains an invitation to those at the same level in the distribution chain to commence, or to continue, horizontal territorial allocations of markets without fear of private antitrust claims from victims of such *per se* illegal activity.

Such a state of affairs is anathema to this Court's antitrust philosophy and rulings. This Court has repeatedly stated that vigorous private enforcement is a vital part of a broad §4 remedy and has two purposes: (1) to compensate victims, and (2) to deter violators and to deprive them of the fruits of their illegal actions. *Blue Shield*, 102 S. Ct. at 2545; *Illinois Brick*, 431 U.S. at 746; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). Having suffered antitrust injury "by reason of" the *per se* illegal antitrust scheme, Randolph should be permitted to pursue privately its challenge of the entire scheme and thereby to vindicate its own, and the public's, interest in making the Nation's markets free of horizontal territorial allocations of markets.

In *Ostrofe*, 670 F.2d 1378, the Ninth Circuit said that the furtherance of the private enforcement purpose of §4 was an important factor in determining whether a particular plaintiff has antitrust standing:

> The extent to which allowing a particular class of plaintiffs to bring suit for damages will further the enforcement purpose of §4 is an important factor in determining whether such plaintiffs should be allowed standing.
>
> * * *
>
> It is unnecessary, and would be contrary to the purposes of §4, to erect an arbitrary and absolute bar to treble damage suits for injuries that result from a conspirator's efforts to implement the anticompetitive aspects of the conspiracy.
>
> *Id.* at 1383.

The Ninth Circuit also said activities such as price fixing and customer allocation are invariably covert, and, noting a commentator's view that "there is rarely an identifiable victim [of an antitrust violation] who is aware of the violation" [Berger and Bernstein, "An Analytical Framework for Antitrust Standing," 86 *Yale L. J.* 809, 847 n.172 (1979)], observed that "[c]overt conspiracies in restraint of trade may go undetected by the intended victims." *Ostrofe*, 670 F.2d at 1384.

In the Ninth Circuit's view as expressed in *Ostrofe*, a "timely suit by an employee discharged for resisting a price-fixing scheme may prevent injury to the consumer or competitor who would otherwise have been its victims." *Ostrofe*, 670 F.2d at 1384-1385. It said in *Ostrofe* that "enforcement considerations," in the face of an unequivocally condemned *per se* illegal activity, supported a finding of standing, and it flatly rejected defendants' argument that the "floodgates" of litigation would be opened if plaintiff were granted antitrust standing.

If Randolph is not permitted to attack defendants' *per se* illegal agreement, it is virtually certain that no one else can or will. Shop-Rite consumers probably are not

even aware of Shop-Rite's *Topco*-type agreement, and even if they are, a suit by them—presumably based upon higher prices paid at other Shop-Rite locations because of the non-existence of Shop-Rites in particular quantities or in particular locations—could be attacked by the Shop-Rite defendants as being "speculative" and "hypothetical." Village's cowardice here is proof of the extent to which a member of the Wakefern association is likely to challenge the rules of the game. Who but Randolph is going to stand up to this naked restraint?

Defendants argued below, and presumably will argue here, that granting plaintiff standing here would open up the "floodgates" of antitrust litigation. Defendants' professed concern for the federal judiciary's workload is defendants' way of saying they want to continue to engage in perniciously and palpably illegal horizontal allocations of territories of markets but not be called to task therefor under the antitrust laws. This Court's recognition of Randolph's antitrust standing will continue to enable those who have suffered injury "by reason of" an antitrust violation, and a *per se* one at that, to pursue their antitrust remedies, and, further, will provide a deterrent to such *per se* illegal activities in the future. As in *Ostrofe*, a §4 action by Randolph can help consumers in a situation where consumers, the intended victims, either do not know they are being injured by a *per se* illegal antitrust violation or otherwise cannot redress such a violation.

Moreover, this Court already has rejected the "floodgates" argument in connection with assessing who has antitrust standing. In *Reiter*, the Court acknowledged that granting standing to consumers "may well" add a "significant burden to the already crowded dockets of the federal courts" but said Congress' intention of encouraging a strong private §4 remedy controls over

problems of crowded dockets. *Reiter*, 442 U.S. at 344. Also, although providing antitrust standing for consumers in *Reiter* provided a whole new category of antitrust plaintiffs, it can hardly be said that granting standing for Randolph here will have the same effect. The Court also rejected the "floodgates" argument in *Community Communications Company, Inc. v. City of Boulder, Colorado*, 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982).

If the Third Circuit's ruling is left intact, *per se* illegal *Topco*-type agreements will have a kind of imprimatur of propriety upon them. If the Third Circuit's ruling is left intact, whether the Nation's economy is to suffer *Topco*-type agreements will turn solely on whether the United States government in its prosecutorial discretion elects to pursue an injunctive action. Because such results violate the fundamental premises upon which the Congress and the Court have developed the antitrust laws, the Court should review this matter.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted so this Court can review this matter and order the reinstatement of Randolph's complaint.

Respectfully submitted,

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Attorneys for Petitioner,
Randolph Associates

Dated: January 21, 1983
Newark, New Jersey

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5209

RANDOLF ASSOCIATES, a partnership composed of HOWARD BASS, LAWRENCE BERGER, CLAYTON HOLDING CO., a New Jersey Corporation, STEVEN RACHLIN, SBS ASSOCIATES, LTD., a partnership and HOWARD WACHTEL

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMONIC ROMANO, and RONETCO, INC.,

RANDOLPH ASSOCIATES,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. CIVIL ACTION NO. 81-01059)

Submitted Pursuant to Third Circuit Rule 12(6)
October 21, 1982

Before: WEIS AND BECKER, *Circuit Judges* and CAHN*, *District Judge.*

* The Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

Randolph Associates brought this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, to recover treble damages and to obtain injunctive relief against the appellees for their violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. Randolph also sought relief for breach of contract under New Jersey law.

The district court dismissed the federal antitrust claims on the grounds that Randolph had not met the requirements for standing under Sections 4 and 16 of the Clayton Act. The court dismissed the pendent state law claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

On this appeal, Randolph contends that the district court did not apply the correct standard in determining standing under Section 4.

The case law in this Circuit on standing under Section 4 is well established. *See, e.g., Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501 (3d Cir. 1976); *Bravman v. Bassett Furn. Industries, Inc.*, 522 F.2d 90 (3d Cir. 1977), *cert. denied*, 434 U.S. 823 (1977); *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

Having considered all the contentions raised by the appellant in light of the standards set forth in these cases, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ Weis
WEIS, Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS, Clerk

Dated: Oct. 26, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-1059

RANDOLPH ASSOCIATES, etc.,

Plaintiff,

vs.

WAKEFERN FOOD CORP., et al.,

Defendants.

OPINION
Original Filed March 2, 1982

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FISHER, Chief Judge.

In this antitrust action defendants previously moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), urging that plaintiff lacks standing to bring this action. Since defendants supported their motion with matters outside the pleadings, this court treated the rule 12(b)(6) motion as a rule 56 motion for summary judgment. I then determined that there was a genuine issue as to a material fact which bore on plaintiff's standing and therefore held that

> [s]ummary judgment is never warranted except on a clear showing that there are no genuine issues of material fact. *Ely v. Hall's Motor Trans. Co.*, 590 F.2d 62 (3d Cir. 1978). Not only does the factual dispute set out above render this case inappropriate for summary judgment, but it would be especially

premature to decide the issue of plaintiff's standing to seek damages and equitable relief under this circuit's "factual matrix" test when all of the facts have not yet been established.

Randolph Associates v. Wakefern, No. 81-1059, slip op. at 5 (October 30, 1981). I further held there was a dispute as to the requirements of the lease between plaintiff and defendant Village Super Market, Inc. (Village). Plaintiff alleges in its complaint that the lease required Village to operate a Shop-Rite supermarket; whereas, Village asserts that the lease only required that it operate a retail store, which did not have to be a supermarket, much less a Shop-Rite supermarket.

I viewed the standing issue, which was resolved on the rule 56 motion, as a threshold issue which should be resolved before proceeding any further with this case. If a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties. 9 Wright & Miller, Federal Practice & Procedure: Civil §2388 at 281 (1971).

Rule 42(b) of the Federal Rules of Civil Procedure authorizes a court to order a hearing on an issue when it will be conducive to expedition of the case and judicial economy. Therefore, I ordered an evidentiary hearing on the issue of standing, at which time the parties presented oral argument, oral testimony and documentary evidence on the requirements of the lease between plaintiff and Village.

The lease was jointly drafted and prepared by plaintiff and Village and is clear and unambiguous. Clearly, the parties intended that Village operate a Shop-Rite supermarket at the demised premises. The language of the lease contemplates that the demised premises were to be operated as a Shop-Rite supermarket; however, the lease

did not require that the premises be operated as a Shop-Rite supermarket. Specifically paragraph 4 of the lease provides that the premises may be used for any lawful purpose. Furthermore, paragraphs 4(a) and 39 permit the tenant to assign or sublet the demised premises, in whole or in part, and the assignee or sublettee may use the premises for any lawful purpose.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that "[a]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . ." Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 263 n.14 (1972). Courts have impressed a standing doctrine so as to confine the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws. *Cromar Company v. Nuclear Materials and Equipment Corporation*, 543 F.2d 501, 505 (3d Cir. 1976), quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir. 1973).

The *Cromar* court described the test for determining standing as requiring that "each case . . . must be carefully analyzed in terms of the particular factual matrix presented." *Id.* at 506. The *Cromar* court also identified several factors which must be considered in making the analysis of the factual matrix, among which are the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator—the directness or indirectness of the injury, the alleged effect of the antitrust violation upon the plaintiff, and plaintiff's position in the area of the economy threatened by the alleged anticompetitive acts. *Id.* at 506 and 508.

Applying the *Cromar* standing test to the facts of this case, I find that plaintiff lacks the requisite standing under section 4 of the Clayton Act. The alleged antitrust violation is a conspiracy to implement, maintain and enforce an unlawful horizontal division of markets in restraint of trade in the retail supermarket business. The industry in which the alleged antitrust violation exists is the retail supermarket business, not the shopping-center development industry.

Plaintiff is a shopping-center developer and is not in the retail supermarket business, nor is it a competitor of defendants. Rather, plaintiff is Village's lessor and their relationship is grounded in contract. A landlord-tenant relationship also exists between plaintiff and other of the defendants. Due to the nature of the relationship between plaintiff and defendants, I find that any alleged injury is too remote and indirect to warrant relief under the antitrust laws. *See Monmouth Real Estate Investment Trust v. Manville Foodland*, No. 81-2033 (D.N.J. October 5, 1981).

Plaintiff alleges that defendants' antitrust violation has caused Village to anticipatorily breach its lease with plaintiff. I have construed the lease as permitting defendant to use the premises for any lawful purpose; therefore, the parties could have performed under the lease even if there was an antitrust violation. Given my interpretation of the lease, it necessarily follows that, as a matter of law, there was no injury to plaintiff from the alleged antitrust violation. Plaintiff may have been injured by a breach of contract by defendants, but it clearly was not affected, as a matter of law, by defendants' alleged antitrust violations.

Finally, as stated above, plaintiff is a shopping-center developer in the real-estate development industry. The alleged antitrust violation affects the retail supermarket

business. Thus, in accordance with the *Cromar* standard, plaintiff is not in the area of the economy endangered by the alleged anticompetitive acts. *Cromar Company v. Nuclear Materials and Equipment Corporation*, 543 F.2d at 508.

A further justification for dismissing the complaint is plaintiff's failure to establish that it has suffered antitrust injury. The Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in discussing the showing necessary under section 4 of the Clayton Act, held that

> for plaintiffs to recover treble damages . . . they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489 (emphasis in original). Plaintiff's alleged injury may be causally linked to the alleged antitrust violation, but it is not antitrust injury. The alleged injury is purely contractual—it simply involves the alleged breach of a lease and does not reflect the anticompetitive effect of defendants' alleged antitrust violation which is an unlawful horizontal allocation of the retail supermarket.

Plaintiff has also invoked section 16 of the Clayton Act seeking injunctive relief. This circuit has articulated the gravamen of a claim for relief under section 16 in *Midwest Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979), wherein the court states that a plaintiff "must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation." *Id.* at 591-92 n. 74. As stated above, plaintiff cannot meet this test.

Furthermore, plaintiff has an adequate remedy at law in an action to enforce the terms of the Randolph-Village lease, rendering injunctive relief unwarranted. For this reason and for plaintiff's lack of standing as indicated above, the First Count of the complaint is dismissed. The Second, Third and Fourth Counts of the complaint are all state-law contract claims and are hereby dismissed pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). An order accompanies this opinion.

March 1, 1982.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-1059

RANDOLPH ASSOCIATES, etc.,

Plaintiff,

vs.

WAKEFERN FOOD CORP., et al.,

Defendants.

ORDER
(Original Filed March 2, 1982)

For the reasons set forth in the court's opinion filed this date, it is on this 2nd day of March, 1982,

ORDERED that the complaint in this matter be dismissed. No costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER,
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-1059

RANDOLPH ASSOCIATES, etc.,

Plaintiff,

vs.

WAKEFERN FOOD CORP., et al.,

Defendants.

OPINION
(Original filed October 30, 1981)

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FISHER, Chief Judge.

This motion to dismiss is brought by defendants pursuant to rule 12(b)(6), Federal Rules of Civil Procedure, for a failure to state a claim upon which relief can be granted. Defendants supported their motion with matters outside the pleading; this converted the rule 12(b)(6) motion into a motion for summary judgment to be disposed of as provided in rule 56. Adequate notice of the conversion has been given to all parties.

Plaintiff, Randolph Associates, is a real estate developer and landlord of a proposed shopping center in Randolph Township, New Jersey. In August 1973 plaintiff's predecessor in interest entered into a written agreement with defendant Village Supermarket to construct and lease to Village a building in the proposed shopping center, in which Village was to operate a retail store. Plaintiff alleges that Village was to operate a retail supermarket under the name of "Shop Rite," and that Village has anticipatorily breached the contract. Plaintiff's claim, however, extends far beyond that for breach of contract. Plaintiff alleges that defendant Wakefern Food Corp., a cooperative association owned by members who operate "Shop Rite" retail supermarkets, and

defendants Village, Romano and Ronetco, all members of Wakefern, entered into an unlawful conspiracy in restraint of trade whereby no member of Wakefern can use the name Shop Rite or operate a Shop Rite retail supermarket within a 5-mile radius of a pre-existing Shop Rite supermarket without the express consent of such pre-existing supermarket. Defendants Romano and Ronetco both operate Shop Rite supermarkets within 5 miles of the proposed shopping center. Plaintiff alleges that Romano and Ronetco refused to consent to the operation of the new Shop Rite, thereby causing Village to breach its lease agreement with plaintiff.

Plaintiff has instituted this action seeking damages and injunctive relief from defendants by virtue of an alleged violation of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1,2. Plaintiff also brings, by way of pendent jurisdiction, claims for breach of contract, interference with a prospective economic advantage, and interference with contractual relations.

Defendants contend on this motion that: (A) plaintiff lacks standing to press its claim for antitrust damages, (B) plaintiff cannot establish an "antitrust injury," and (C) plaintiff's allegation of threatened injury is insufficient to afford injunctive relief.

Rule 56(c) provides that a summary judgment shall be rendered if "there is no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." The party who moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact. *Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408, 413 (3d Cir. 1976). The existence of disputed issues should be ascertained by resolving all inferences, doubts and issues of credibility against the moving party. *Ely v. Hall's Motor Trans. Co.*, 590 F.2d 62, 66 (3d Cir. 1978).

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ." A literal construction of this statute would afford relief to all persons whose injuries are causally related to an antitrust violation. However, §4 has been interpreted in a more narrow fashion. As the United States Supreme Court noted in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 405 U.S. at 263 n.14.

The test for standing under §4 of the Clayton Act has been spelled out in this circuit by *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501 (3d Cir. 1976) and *Bravman v. Basset Furn. Industries, Inc.*, 552 F.2d 90 (3d Cir. 1977). In *Cromar*, the court analyzed earlier Third Circuit opinions on §4 standing and concluded

> [e]ach case . . . must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this plaintiff is one "whose protection is the fundamental purpose of the antitrust laws."

543 F.2d at 506 (citation omitted). This approach was followed a year later in *Bravman*. In that case, the court noted

> [w]e think . . . [the] . . . election to avoid labelling in favor of an examination of the factual matrix presented by each case in light of the policies underlying the antitrust laws is the more reasoned approach to §4 standing. That approach recognizes that §4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all §4 standing problems.

552 F.2d at 99.

My examination of this case reveals that there does exist a genuine issue of material fact. Two of the factors to be considered in determining §4 standing are the relationship between the plaintiff and the alleged violators and the alleged effect of the antitrust violation upon the plaintiff. While it is undisputed that plaintiff entered into a lease with defendant Village, there is a dispute as to the requirements of that lease. Plaintiff alleges in its complaint that Village was required to operate a Shop Rite retail supermarket in the proposed shopping center; Village contends that it was only obligated to operate a retail store, that it did not even have to be a supermarket, much less a Shop Rite supermarket. The resolution of this factual dispute will have a bearing on the issue of standing. If the entire lease was conditioned on Wakefern's approval of a new Shop Rite supermarket and the alleged conspiracy prevented it from going forward, the injury to plaintiff would be more direct than if the lease simply foresaw any retail store and could go forward regardless of Wakefern's actions.

Summary judgment is never warranted except on a clear showing that there are no genuine issues of material fact. *Ely v. Hall's Motor Trans. Co.*, 590 F.2d 62. Not only does the factual dispute set out above render this case inappropriate for summary judgment, but it would

be especially premature to decide the issue of plaintiff's standing to seek damages and equitable relief under this circuit's "factual matrix" test when all of the facts have not yet been established. Accordingly, defendants' motion is denied. Plaintiff shall submit an order within 10 days. No costs.

APPENDIX E

UNITED STATES DISTRICT COURT
District of New Jersey

RANDOLPH ASSOCIATES, a partnership composed of HOWARD BASS, LAWRENCE BERGER, CLAYTON HOLDING CO., a New Jersey Corporation, STEVEN RACHLIN, SBS ASSOCIATES, LTD., a partnership and HOWARD WACHTEL,

Plaintiff,

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, and RONETCO, INC.,

Defendants.

Honorable Clarkson S. Fisher

Civil Action No. 81-1059

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants', by notice of motion dated June 29, 1981, moved to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted and the defendants' having supported their motion with matters outside the pleadings, the motion was converted, pursuant to *Fed. R. Civ. P.* 12(b), into a motion for summary judgment to be disposed of as provided in *Fed. R. Civ. P.*

56, and the Court having considered the pleadings as well as the briefs submitted and having heard the oral argument of counsel for the respective parties on October 13, 1981, and the Court having issued a written opinion, denying defendants' motion on October 30, 1981, and for good cause shown,

IT IS on this 4th day of November, 1981 ORDERED that defendants motion be, and hereby is, denied.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RANDOLPH ASSOCIATES, a partnership composed of HOWARD BASS, LAWRENCE BERGER, CLAYTON HOLDING CO., a New Jersey Corporation, STEVEN RACHLIN, SBS ASSOCIATES, LTD., a partnership and HOWARD WACHTEL,

Plaintiff,

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, and RONETCO, INC.,

Defendants.

HONORABLE CLARKSON S. FISHER

CIVIL ACTION NO. 81-1059

AMENDED ORDER DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Original Filed Nov. 17, 1981)

Defendants, by notice of motion dated June 29, 1981, moved to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted and the defendants having supported their motion with matters

outside the pleadings, the motion was converted, pursuant to *Fed. R. Civ. P.* 12(b), into a motion for summary judgment to be disposed of as provided in *Fed. R. Civ. P.* 56, and the Court having considered the pleadings as well as the briefs submitted and having heard the oral argument of counsel for the respective parties on October 13, 1981, and the Court having issued a written opinion, denying defendants' motion on October 30, 1981, and for good cause shown,

IT IS on this 17th day of November, 1981 ORDERED that defendants' motion be, and hereby is, denied without prejudice.

And it is FURTHER ORDERED that this Amended Order supersedes the Order entered November 4, 1981 in this matter.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER, U.S.D.J.

APPENDIX F

UNITED STATES CODE

Title 15

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX G

UNITED STATES CODE

Title 15

§15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

§26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss of damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,

Defendants.

FINAL DECREE

OAKLAND RAIDERS, LTD.,

Cross-Claimant,

vs.

NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,

Cross-Defendants.

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to §16 of the Clayton Act (15 U.S.C. §2).

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have unreasonably restrained trade and commerce in violation of §1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorney's fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or

carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

/s/ Harry Pregerson
HARRY PREGERSON
United States Circuit Judge
Sitting by Designation

Dated: June 14, 1982.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982
NO. 82-1287

RANDOLPH ASSOCIATES, a partnership composed of Howard Bass, Lawrence Berger, Clayton Holding Co., a New Jersey corporation, Steven Rachlin, SBS Associates, Ltd., a partnership, and Howard Wachtel,
Petitioner,

v.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, AND RONETCO, INC.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 22.6, petitioner Randolph Associates submits this supplemental brief in support of its pending petition for a writ of certiorari in order to discuss Crimpers Promotions, Inc. v. Home Box Office, Inc., and Showtime Entertainment Corp., 1982-3 Trade Cas. (CCH) ¶65,123 (S.D.N.Y. Dec. 30, 1982), a case not available when the petition was prepared. Unlike the Court of Appeals below in the case sub judice, the court in Crimpers considered and applied Blue Shield of Virginia v. McCready, 457 U.S. -, 102 S. Ct. 2540 (1982), to sustain a plaintiff's antitrust standing against the defense, also asserted here, that it had not suffered antitrust injury.

In Crimpers, plaintiff organized a cable television trade show to provide a

forum in which independent buyers and sellers of cable programming could transact business face-to-face. Defendants Home Box Office Inc. ("HBO") and Showtime Entertainment Corporation ("Showtime") are two of the leading companies in the cable television industry and are in the business of purchasing "programming from independent producers and suppliers" and then packaging "this programming into a complete network format for sale to cable system operators." Id. at 71,287.

Plaintiff alleged that HBO and Showtime conspired to cause independent programmers, suppliers, and potential purchasers of programming, along with HBO and Showtime, to boycott the trade show. HBO and Showtime, as middlemen between independent producers of programs and cable net-

works, allegedly organized the boycott because they feared that face-to-face "stand-alone"[1] business, directly between suppliers and purchasers of programming, would reduce or eliminate HBO's and Showtime's economic power in the cable industry. Id. The trade show was held, but participation was disastrously low and plaintiff was forced to cease business. Plaintiff then filed suit contending that as a result of defendants' actions "defendants have reduced competition in the markets for the sale and purchase of programming for cable television." Id. It is significant to note plaintiff did not claim a reduction in competition as to the

---

1 "Stand-alone" programming was defined as a "practice whereby a cable operator acquires programming directly from a producer or supplier and schedules it for transmission to subscribers." Id. at 71,287 n.1.

business in which it was engaged, viz., production of cable television trade shows.

Defendants responded that Crimpers did not have standing under §4 of the Clayton Act, 15 U.S.C. §15, as (1) Crimpers did not directly compete with defendants in the buying and selling of cable programming, (2) Crimpers did not incur direct injury, and (3) Crimpers was "simply a means" (emphasis in the original) to defendants' ultimate goal of restraining trade in the cable television industry. Id. at 71,289. The district court rejected each of these arguments on the basis of this Court's decision in Blue Shield.

On the direct competition argument, the court found, quite correctly, that a plaintiff need not be a direct com-

petitor in the market in which defendants operate, referring not only to Blue Shield but also to Aurora Enterprises v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982), a case discussed in Randolph's petition at 21-22. On the direct injury argument, the court found that, in fact, calculation of Crimpers' direct boycott losses would be far easier than calculation of the indirect losses incurred by defendants' direct competitors on account of an overall reduction in competition, id. at 71,291-2; similarly, in the instant case, calculation of Randolph's losses due to defendants' aborting of the real estate development is far easier than calculation of losses suffered by Shop-Rite consumers due to the per se illegal horizontal territorial allocation of markets.

On the argument that "destruction of plaintiff's trade show was arguably only a means by which defendants sought to restrain trade" (id. at 71,291; emphasis added), the court said:

> It was never suggested in McCready that the refusal to reimburse subscribers for psychology services was any more than a mere means to further the defendants' goal of reducing competition in the market for psychotherapy services.
>
> Id. at 71,291 (emphasis added).
>
> Under these facts, Crimpers was no mere supplier or customer, tangentially related to the goal of the conspiracy. As in McCready, the boycotting and intended destruction of plaintiff's trade show was one of the clearest and most direct means by which to achieve defendants' alleged goal of

> restraining trade in the buying and selling of cable programming on a stand-alone basis.
>
> Id. at 71,292 (emphasis added).

The Crimpers case underscores an important point Randolph made in its petition: Randolph, having been injured by the means used to accomplish the Sherman Act-proscribed restraint upon the market in which defendants were engaged, has §4 antitrust standing even though it was not in the business in which defendants were engaged. Like the plaintiff in Blue Shield and Crimpers, Randolph was the victim of the means used to achieve the illegal restraint.

If the decision below remains, an ineluctable conflict between the circuits

results---those which do apply this Court's Blue Shield standing criteria, and the Third Circuit which literally ignored Blue Shield.

Respectfully submitted,

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Randolph Associates

DATED: March 14, 1983
Newark, New Jersey

No. 82-1287

IN THE

Supreme Court of the United States

October Term, 1982

RANDOLPH ASSOCIATES, a partnership composed of Howard Bass, Lawrence Berger, Clayton Holding Co., a New Jersey corporation, Steven Rachlin, SBS Associates, Ltd., a partnership, and Howard Wachtel,

Petitioner,

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, and RONETCO, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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Question Presented

Should the Supreme Court review the dismissal of a treble damage antitrust suit where: (1) the district court found that plaintiff's alleged harm was totally independent of the asserted antitrust violation; and (2) the courts below adhered to a consistent line of authority, recently reaffirmed by this Court, in dismissing for lack of standing a case in which (a) plaintiff admittedly did not participate in the market in which competition allegedly was threatened by the purported violation, (b) plaintiff's alleged injury resulted only derivatively from the effect of the alleged violation upon a party with which plaintiff had entered into a contract, and (c) plaintiff's asserted injury did not flow from that which would make the alleged violation unlawful?

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Statutes and Other Authorities:

No. 82-1287

IN THE

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Statement of the Case

This case involves the alleged breach of a lease agreement, and the damages which the plaintiff/petitioner Randolph Associates ("Randolph") claims to have suffered as a result of that breach. As such, petitioner has concurrently commenced a breach of contract suit in New Jersey

state court. *Randolph Associates* v. *Wakefern Food Corp., et al.*, No. L-062666-81 (Superior Ct., Essex Co.). However, like numerous unsuccessful plaintiffs in the federal courts, petitioner has also attempted to transmute its prosaic state contract claim into a golden, treble damage antitrust windfall. Thwarted unanimously below, petitioner offers this Court no reason why it should hear this case. Nor could there be any such reason, when: (1) as the subject lease makes clear, and as the district court found, any injury petitioner may have suffered was wholly unrelated to the purported federal antitrust violation; and (2) the courts below adhered to long-established and consistent authority, recently reaffirmed by this Court, in dismissing the Complaint.

The Parties

Petitioner is a commercial real estate developer in New Jersey (P. App. D at 13a).[1] Defendants-respondents Villarge Super Market, Inc. ("Village") and Ronetco, Inc. ("Ronetco") own and operate supermarkets (directly or indirectly) under the "ShopRite" name. (P. App. D at 13a-14a). Defendant-respondent Dominick Romano is a shareholder of Ronetco and/or subsidiaries thereof. (Ronetco Answer ¶ 9). Wakefern Food Corp. ("Wakefern") is a corporation operated under a cooperative plan, which provides

1. References to the instant Petition for a Writ of Certiorari are denoted as "Pet. at —." References to the Appendices to the Petition are denoted as "P. App. — at —." Petitioner's Complaint appears at pages 4 through 9 of the Joint Appendix submitted to the Court of Appeals for the Third Circuit ("Jt. App."). References to the answer of a party are denoted as "—— Answer ¶ —." The answers of the defendants appear at pages 109-125 of the Joint Appendix.

certain services to its shareholders with regard to the operation of "ShopRite" supermarkets. (Wakefern Answer ¶ 3).

The Complaint

Petitioner alleged that on or about August 6, 1973, its predecessor-in-interest entered into a written lease agreement (the "Lease") with Village for the construction and lease to Village of a building and store space in a proposed shopping center and contiguous office building. (P. App. D at 13a). Petitioner further asserted that Village subsequently "informed plaintiff of its refusal to perform the aforesaid lease, thus anticipatorily breaching its lease agreement with plaintiff" and damaging petitioner. (Complaint ¶ 19).

Lured by the prospects and coercive effects of the treble damage provision of Section 4 of the Clayton Act, petitioner then sought to force its claimed contractual harm into an antitrust mold, even though, by petitioner's own admission, the alleged antitrust violation restrained trade only in a business (the retail supermarket business) in which petitioner does not operate. Thus, petitioner alleged that: (1) the subject premises were "to be operated . . . as a supermarket under the name of 'ShopRite' " under license from Wakefern, a supermarket cooperative association (P. App. D at 13a; Complaint ¶¶ 7, 12); and (2) Wakefern denied Village a license to operate a "ShopRite" supermarket on the subject premises as the result of an agreement between Wakefern and its members, "the effect of [which agreement] is to implement, maintain and enforce an unlawful horizontal division of markets by and among defendants in

restraint of trade . . . in the *retail supermarket business.*" (P. App. D at 14a; Complaint ¶ 16). (Emphasis supplied.)[2]

The Lease

Not only did the Complaint demonstrate that any alleged antitrust violation did not relate to a business in which petitioner operated, but it also made clear that the contractual harm claimed by petitioner was totally independent of any such violation. In paragraph 29 of its Complaint, petitioner admitted that Village's performance under the Lease was not conditioned upon Village's obtaining approval to operate a ShopRite supermarket on the subject premises. And, the Lease, a 36-page integrated contract, clearly and unambiguously provides that Village could use the leased premises for *any* lawful purpose:

> "4. *Use of Leased Premises*: The leased premises shall be used for all lawful purposes including the conduct of a supermarket for the retail sale of food, drugs, and such non-food items as are sold in supermarkets in the Metropolitan New York area . . . ."

Furthermore, Village was free to assign or sublet the premises to any tenant for any lawful purpose:

> "4. *Use of Leased Premises* . . . .
>
> (a) Tenant may assign this lease or sublease the demised premises or any portion thereof to be used for any lawful purpose . . . ."

* * *

2. Petitioner also brought the same state law claims that it raised in its action in the New Jersey courts. Upon the dismissal of the antitrust claim, the state claims were also dismissed in this case for lack of federal jurisdiction. (P. App. B at 10a). However, those state law claims—which are the essence of the dispute between the parties—are still pending before the New Jersey state courts.

> "39. *Assignment and Subletting*: Tenant may sublet all or any part of the Demised Premises, or license the use of any portion thereof, or assign this lease, but Tenant shall nevertheless continue to remain liable hereunder. . . ."

In short, the Lease did not contain any requirement that Village operate a ShopRite supermarket, nor did it condition the performance of either party upon Village's obtaining approval for a ShopRite store. Thus, the grant of, or the refusal to grant, a license by Wakefern had no bearing on the obligations of the parties to perform under the Lease.[3]

Proceedings Below

After initially denying defendants' motion to dismiss the antitrust claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6),[4] the district court granted defendants' motion to reargue. On that motion, the court found—after a hearing—that petitioner's claimed damage was not related to the alleged antitrust violation, and, therefore, dismissed the Complaint:

> "The lease . . . is clear and unambiguous. . . . *The lease did not require that the premises be operated as a ShopRite supermarket.*" (P. App. B at 6a-7a). (Emphasis supplied.)

* * *

3. Despite petitioner's contention to the contrary (Pet. at 5), defendants obviously did not concede that Village's alleged breach of the Lease resulted from the purported antitrust violation.

4. The district court initially held that defendants' motion should be considered as one for summary judgment under Fed. R. Civ. P. 56, because defendants annexed a copy of the Lease as an exhibit to their motion. (P. App. C at 16a).

> "[T]he lease [permits] defendant to use the premises for any lawful purpose; therefore, *the parties could have performed under the lease even if there was an antitrust violation* . . . [I]t necessarily follows that, as a matter of law, there was no injury to plaintiff from the alleged antitrust violation. *Plaintiff may have been injured by a breach of contract by defendants, but it clearly was not affected, as a matter of law, by defendants' alleged antitrust violations.*" (P. App. B at 8a). (Emphasis supplied.)[5]

In addition, the district court dismissed the Complaint on the grounds that, regardless of the requirements of the Lease, petitioner lacked standing because its alleged injury: (1) was too remote from the alleged unlawful conduct; and (2) did not reflect the anticompetitive impact of the claimed violation:

> "[P]laintiff lacks the requisite standing under section 4 of the Clayton Act. The alleged antitrust violation

5. Because, as the district court found, the terms of the Lease were "jointly drafted and prepared by plaintiff and Village," and are "clear and unambiguous" (P. App. B at 6a), the Lease was able to "speak for itself." It is well settled in the State of New Jersey that parol evidence may not be considered to vary or contradict the unambiguous express terms of a written agreement. *E.g., Palmiere* v. *Forte*, 56 N.J. 155, 265 A.2d 539, 543 (1970); *Central Hanover Bank & Trust Co.* v. *Herbert*, 1 N.J. 426, 64 A.2d 75, 76 (1949). Specifically, parol evidence may not be considered to vary the effect of a use restriction in a real estate lease. *61-69 Pierrepont Street* v. *Feist*, 124 N.J.L. 412, 11 A.2d 727, 729 (1940); *Loria's Garage, Inc.* v. *L.E. Smith*, 49 N.J. Super. 242, 139 A.2d 430, 433 (App. Div. 1958).

Nevertheless, the district court held an evidentiary hearing at which it permitted petitioner to introduce extrinsic evidence as to the meaning of the Lease. However, far from contradicting the terms of the Lease, the documentary evidence and testimony presented by petitioner confirmed that the Lease did not require, and was not conditioned upon, the construction and operation of a ShopRite supermarket (P. App. B at 6a). Indeed, one of plaintiff's principals, a sophisticated real estate attorney, admitted in his testimony in open court that the Lease did not require that a ShopRite be built on the premises. (Jt. App. at 204).

is a conspiracy to implement, maintain and enforce an unlawful horizontal division of markets in restraint of trade in the retail supermarket business. *The industry in which the alleged antitrust violation exists is the retail supermarket business, not the shopping center development industry.*

"Plaintiff is a shopping-center developer and is not in the retail supermarket business, nor is it a competitor of defendants. Rather, plaintiff is Village's lessor and their relationship is grounded in contract . . . . Due to the nature of the relationship between plaintiff and the defendants, I find that *any alleged injury is too remote and indirect to warrant relief under the antitrust laws.*" (P. App. B at 8a). (Emphasis supplied.)

* * *

"A further justification for dismissing the complaint is plaintiff's failure to establish that it has suffered antitrust injury. . . . Plaintiff's alleged injury may be causally linked to the alleged antitrust violation, but it is not an antitrust injury. *The alleged injury is purely contractual—it simply involves the alleged breach of a lease and does not reflect the anticompetitive effect of defendants' alleged antitrust violation. . . .*" (P. App. B at 9a). (Emphasis supplied.)

By judgment order dated October 26, 1982 (P. App. A), the Court of Appeals for the Third Circuit unanimously affirmed the district court's order dismissing petitioner's thinly disguised breach of contract claims. In so doing, the Court of Appeals adhered to clear and longstanding authority.

REASONS FOR DENYING THE PETITION

Summary of Argument

This Court will grant review on a writ of *certiorari* "only when there are special and important reasons therefor," such as when the decision presents a conflict with the circuit courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be settled by this Court" (Rule 17, Supreme Court Rules). Because no such reason is present herein,[6] the Court should deny the instant petition.

First, given the plain meaning of the Lease, this action may be disposed of without reaching any federal legal issue at all. As the district court found, the alleged antitrust violation in no way affected the obligations of the parties to perform under the Lease, and therefore was entirely unrelated to petitioner's asserted harm. Petitioner must therefore rely upon its state court breach of contract action for any remedy. (Point I).

Additionally, in dismissing the Complaint, the courts below applied well established doctrine with regard to antitrust standing, and this Court's recent decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 51 U.S.L.W. 4139 (February 22, 1983), disposed of any question as to the correctness of their judgments. Because petitioner was not a participant in the market allegedly restrained by the purported violation, and because petitioner's alleged injury flowed only

6. Indeed, petitioner does not specify any "special and important reasons," but rather submits a brief on the merits.

derivatively from the claimed breach of contract, petitioner cannot satisfy the requirements for treble damage antitrust standing. (Point II).

I.

BECAUSE THERE IS NO QUESTION THAT PETITIONER'S ALLEGED INJURY WAS UNRELATED TO THE CLAIMED ANTITRUST VIOLATION, THERE IS NO ISSUE WARRANTING REVIEW BY THIS COURT.

Despite petitioner's use of antitrust terminology, it simply has been unable to state anything more than a contract claim. As the district court specifically found:[7] petitioner's injuries, if any, stem solely from the alleged breach of contract by Village; and, because the Lease allowed Village to use the leased premises for any lawful purpose, those alleged contractual injuries are wholly independent of the purported antitrust violation.

As a result, this claim raises no federal legal issue at all, and petitioner's remedy, if any, is one solely in its state court action for breach of contract. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

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7. Significantly, petitioner does not even challenge the district court's findings under Fed. R. Civ. P. 52(a).

II.

THE JUDGMENT BELOW IS FULLY CONSISTENT WITH THE DECISION OF THIS COURT IN *ASSOCIATED GENERAL CONTRACTORS* AND A LONG LINE OF AUTHORITY MANDATING DISMISSAL OF PETITIONER'S CLAIM.

This Court has consistently recognized that, in enacting Section 4 of the Clayton Act, 15 U.S.C. § 15, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* 51 U.S.L.W. at 4143. Although an antitrust violation "may be expected to cause ripples of harm through the . . . economy . . . Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action." *Id.* at 4143-44. Even apart from the lack of any relationship between petitioner's alleged injury and the claimed antitrust violation, the asserted harm to petitioner herein—a participant in the real estate market—was far too indirect and remote from the alleged impact of the asserted violation—on the retail supermarket business—to allow treble damage antitrust standing under Section 4.

A. The Courts Below Applied Wholly Correct Standards in Finding That the Alleged Injury to Petitioner Was Too Remote from the Purported Antitrust Violation to Allow Petitioner Antitrust Standing.

In *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* two trade unions sued a multi-employer bargaining association and

its construction contractor members for treble damages under the antitrust laws. The unions claimed that the defendants had coerced certain users of construction services (*e.g.*, landowners and general contractors) to enter into business relationships with nonunion firms. Reversing the decision of the Ninth Circuit, the Court held that the unions lacked standing to sue under Section 4.

In particular, the Court held that the purpose of Section 4 is to protect the economic freedom of participants in the market restrained by the challenged conduct. *Id.* at 4144. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977). And while the unions' claims related to an alleged restraint in the market for construction contracting and subcontracting, plaintiffs were neither consumers nor competitors in that market; they were involved only in the labor market. 51 U.S.L.W. at 4141-42 and n.14, 4144-45 and n.44.

Additionally, the Court emphasized the indirect or derivative nature of plaintiffs' asserted injury, *i.e.*, that plaintiffs were harmed only by virtue of the effect of the alleged restraint upon third parties with which the unions had hoped to deal. *Id.* at 4145. Accordingly, the Court dismissed the complaint for lack of standing.

The dismissal of the Complaint in the instant action fits squarely within the scope of the *Associated General Contractors* decision. By its own admission, petitioner is not involved in the market which it contends was affected by the alleged violation, *viz.*, "the retail supermarket business." (Complaint ¶ 16). The asserted effect of "higher prices and . . . poorer service . . . in the retail supermarket

business" has no economic nexus with the shopping center/office development business in which petitioner is involved.

Furthermore, like the plaintiffs in *Associated General Contractors,* petitioner herein did not suffer any direct restraint. Rather, the effect on petitioner was, at most, merely derivative of any impact of the alleged violation on its prospective tenant, and indeed, was wholly unrelated to the alleged violation.

Not only is the dismissal of the Complaint herein fully consistent with this Court's decision in *Associated General Contractors,*[8] but the judgments below adhered to long-standing precedent denying antitrust standing to persons not "in the area of the economy threatened by the alleged anticompetitive acts." *Cromar Co.* v. *Nuclear Materials & Equipment Corp.,* 543 F.2d 501, 508 (3d Cir. 1976).[9] In particular, the decisions below followed a long line of authority denying antitrust standing to a plaintiff whose alleged injury was derived from a contractual or other relationship with a person who is affected by an alleged

8. Petitioner relies heavily on the decision in *Blue Shield of Virginia* v. *McCready,* 102 S. Ct. 2540 (1982). As was explained in the subsequent *Associated General Contractors* decision, however, plaintiff in *Blue Shield* was in a very different position from that of petitioner herein. 51 U.S.L.W. at 4142 n.19, 4144-45 and n.44. First, of course, Mrs. McCready's injury was related to the antitrust violation of which she complained. *See* Point I, *supra.* Additionally, as a consumer of psychotherapeutic services, she was a participant in the very market that was the subject of the alleged restraint. 102 S. Ct. at 2549. Finally, she was the direct victim of the alleged conspiracy; indeed, her injury was "inextricably intertwined" with the alleged violation. *Id.* at 2551.

9. *See, e.g., Bogus* v. *American Speech & Hearing Ass'n,* 582 F.2d 277, 286 (3d Cir. 1978); *Brawman* v. *Bassett Furniture Industries, Inc.,* 552 F.2d 90, 99 (3d Cir.), *cert. denied,* 424 U.S. 823 (1977).

antitrust violation in his market and is thereby prevented from, or hindered in, performing his contract with plaintiff.

This analysis applies specifically to a landlord, such as petitioner herein, who complains of an antitrust violation affecting its tenant's market and therefore its tenant's ability to perform under its lease.[10] It applies as well to a franchisor who complains of antitrust violations affecting its franchisee's business, thereby causing a decrease in royalty payments;[11] a patent licensor who complains of loss of royalty income due to alleged antitrust violations affecting its licensee;[12] a vendor who complains of lost sales resulting from antitrust violations affecting the business of its customer;[13] and a shareholder or creditor who sues for losses in the value of his investment caused by the effect

10. *See, e.g., Monmouth Real Estate Investment Trust* v. *Manville Foodland*, App. No. 81-2947 (3d Cir. June 29, 1982); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Melrose Realty Co.* v. *Loews, Inc.*, 234 F.2d 518, 519 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Harrison* v. *Paramount Pictures, Inc.*, 211 F.2d 405 (3d Cir. 1954), *aff'g per curiam*, 115 F. Supp. 312 (E.D. Pa. 1953), *cert. denied*, 348 U.S. 828 (1954); *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, 689-90 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

11. *See, e.g., Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 188-89 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

12. *See, e.g., SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

13. *See, e.g., Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

of an antitrust offense on the firm in which he has an interest.[14]

Thus, even if the alleged antitrust violation caused the claimed breach of contract and resulting injury to petitioner, which it unquestionably did not, the present action would present no novel question or important issue that warrants this Court's attention.[15] To the contrary, this action can and should be disposed of under a long line of uniform authority culminating with this Court's pronouncement in *Associated General Contractors.*[16] Peti-

14. *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Ash* v. *Int'l Business Machines, Inc.*, 353 F.2d 491, 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966).

15. Moreover, since petitioner offers no basis to distinguish its alleged injury from that of any other supplier of goods or services to Village, acceptance of petitioner's arguments could allow any person who may in some way do business with the alleged victim of an asserted antitrust violation to sue for treble damages. As the court stated in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d at 1295, such a result would create a devastating distortion of the antitrust laws:

> "[I]f the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."

See also Blue Shield, 102 S.Ct. at 2547-48.

16. The lower court decisions cited by petitioner do not in any way undercut the soundness of the dismissal of the Complaint herein. First, they do not deal at all with the finding below that petitioner's alleged injury was completely unrelated to the claimed antitrust violation. And, in any event, petitioner's citations are all fully distinguishable, particularly in light of the decision in *Associated General Contractors.*

Petitioner relies heavily upon *Ostrofe* v. *H.S. Crocker Company, Inc.*, 670 F.2d 1378 (9th Cir. 1982). Significantly, this Court has recently vacated the decision in *Ostrofe* and remanded to the Ninth Circuit for further consideration in light of its opinion in *Associated*

(footnote continued on next page)

tioner's state law claim may then be adjudicated in the proper forum—*viz.*, in the New Jersey courts, where petitioner's parallel action is pending.

B. The Judgment Below Applied Correct Standards in Holding That Petitioner Did Not Suffer "Antitrust Injury".

As this Court has made clear, a treble damage antitrust plaintiff must set forth some of facts which demonstrate that it has suffered "antitrust injury," *i.e.*, a sufficient

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General Contractors. H.S. Crocker Company, Inc. v. *Ostrofe*, Dkt. No. 82-174 (S.Ct. Feb. 28, 1983). In addition, unlike the purported injury of petitioner herein, Ostrofe's injury was not derivative from injuries suffered by others participating in a separate area of the economy; rather, he was directly injured by a discharge from employment aimed specifically at him. Furthermore, the number of employees in Ostrofe's situation is "not so numerous that recognizing their claims would threaten a flood of litigation." 670 F.2d at 1385. The same cannot be said for granting standing to those in a contractual or other business relationship with an alleged victim of an antitrust conspiracy. Finally, the court in *Ostrofe* noted that in many situations an employee so discharged would have no other avenue to seek a remedy. Here, of course, petitioner has the New Jersey state courts available to adjudge its pending breach of contract suit.

The other principal cases cited by petitioner are likewise readily distinguishable. In *Hoopes* v. *Union Oil Company of California*, 374 F.2d 480 (9th Cir. 1967), plaintiff was granted standing in its capacity as the operator of a gasoline station, not merely as a landlord/participant in the real estate market. And, in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), and *Aurora Enterprises* v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982), plaintiffs were directly injured, not merely "sideswiped [or] struck by a carom shot," as, at most, was petitioner herein. 433 F.2d at 1076.

Finally, the district court's decision on standing in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 468 F. Supp. 154 (C.D. Cal. 1979), which was not reviewed by the Ninth Circuit, dealt solely with its test for standing to sue for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26). *Id.* at 158-59. However, petitioner's claim herein is one only for damages under Section 4 of the Clayton Act. As was recognized by the Third Circuit (P. App. A at 2a), petitioner abandoned its § 16 claim, dismissed by the district court, on appeal; certainly, petitioner may not revive that claim before this Court. *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950); *Helvering* v. *Wood*, 309 U.S. 344, 348-49 (1940).

"relationship [between] the injury alleged [and] those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful." *Blue Shield of Virginia* v. *McCready, supra,* 102 S.Ct. at 2548. *Accord, Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* 51 U.S.L.W. at 4145.

This requirement was derived from the Court's earlier decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. at 487, in which the Court held that, while every commercial act or arrangement, "whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons," for plaintiffs to recover under the antitrust laws,

> "they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489.

Petitioner's brief essentially ignores this aspect of the requirements for antitrust standing, and does so for good reason from petitioner's perspective. As the district court held, regardless of the interpretation of the Lease, petitioner's claimed injury flowed solely from the alleged breach of contract by its lessee, not from the alleged anticompetitive impact of the claimed conspiracy, *viz.,* to increase prices and reduce service "in the retail supermarket business." (P. App. B at 9a). Petitioner is thus in no better position

than the plaintiff in *Chrysler Corp.* v. *Fedders Corp., supra*, whose antitrust claim was dismissed for lack of "antitrust injury," despite its contention that the defendant breached its contract with plaintiff pursuant to an alleged conspiracy. 643 F.2d at 1234-35.[17]

Accordingly, the judgment below conforms to the decisions of this Court denying treble damage antitrust standing to persons who have not suffered "antitrust injury."

Conclusion

For the foregoing reasons, this action presents no significant federal question for this Court to address, and the Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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17. *See also Larry R. George Sales Co.* v. *Cool Attic Corp.*, 587 F.2d 266, 274-75 (5th Cir. 1979); *Blank* v. *Preventive Health Programs, Inc.*, 504 F. Supp. 416, 419-20 (S.D. Ga. 1980) ("while [plaintiff's] injuries may give rise to a breach of contract claim, such damages cannot be characterized as antitrust injuries remediable by a treble damages action.").

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